



June 26, 2001

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78752

OR2001-2718

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148818.

The Nacogdoches Independent School District (the "district"), which you represent, received a written request for the following information:

the name of the teacher who resigned amid allegations of having inappropriate material inside his school desk in the classroom.

Furthermore, please provide details about the incident and the agreement reached with the teacher.

You state that the district has withheld all "education records" made confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See* Open Records Decision No. 634 (1995) (authorizing educational institutions to withhold student identifying information under FERPA without requesting decision from Office of the Attorney General). You state that there remain only two responsive documents: an "Investigation Summary" prepared by the district's attorney, and a "Resignation and Release Agreement." You contend that these documents are excepted from public disclosure pursuant to section 552.101, 552.102, 552.107(1), and 552.111 of the Government Code.

We note that the "Investigation Summary" you submitted to this office is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of

information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Section 552.022(a)(1) makes specifically makes public “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108” of the Government Code. You do not contend that the “Investigation Summary” is subject to section 552.108. We therefore conclude that the “Investigation Summary” must be released under section 552.022 unless the information is expressly made confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions under the Public Information Act and do not constitute “other law” for purposes of section 552.022. *See, e.g.,* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the layer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal

services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). After reviewing the “Investigative Summary,” we conclude that the district may withhold this document in its entirety pursuant to Rule 503(d).¹

You next contend that the “Resignation and Release Agreement” is excepted from public disclosure pursuant to sections 552.101 and 552.102 of the Government Code. This document is also subject to section 552.022. See Gov’t Code § 552.022(a)(3), (a)(18) (making public “information in [a] . . . contract relating to the receipt or expenditure of public or other funds by a governmental body” and “a settlement agreement to which a governmental body is a party,” respectively). However, as noted above, section 552.022 does not require the release of information made confidential by law. Because you contend that the “Resignation and Release Agreement” is confidential under sections 552.101 and 552.102 of the Government Code, we will address the applicability of these two exceptions.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” In this regard, you contend that the “Resignation and Release Agreement” is made confidential under section 21.355 of the Education Code, which provides that a “document evaluating the performance of a teacher or administrator is confidential.” This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). After reviewing the “Resignation and Release Agreement,” however, we conclude that this document does not contain information that evaluates the performance of the teacher in question. Accordingly, none of the information at issue is made confidential under section 21.355 of the Education Code.

Section 552.102(a) of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

¹Because we resolve this aspect of your request under Rule 503, we need not otherwise address the applicability of section 552.111 of the Government Code to this document.

personal privacy” Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). The “Resignation and Release Agreement” reflects the terms and conditions under which the teacher submitted his resignation to the district, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here.

You express concern that the release of the “Resignation and Release Agreement” would violate the teacher's liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

[t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that 'might seriously damage his standing and associations in his community,' or that impose a 'stigma or other disability' that forecloses 'freedom to take advantage of other employment opportunities.' *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations deleted). The “Resignation and Release Agreement” does not contain any “false charge” against the teacher who resigned. Consequently, the release of this information would not implicate the teachers' Fourteenth Amendment interests. Accordingly, the district must release the “Resignation and Release Agreement” to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/RWP/seg

Ref: ID# 148818

Enc. Submitted documents

c: Mr. James Doughty
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(w/o enclosures)